

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AXIS INSURANCE COMPANY,
An Illinois Corporation,

Plaintiff,

v.

Bernard A. Friedman,
District Court Judge
Case No. 2:08-cv-15298-BAF-MJH

**INNOVATION VENTURES, LLC d/b/a
LIVING ESSENTIALS,** a Michigan Limited
Liability Company, **BODY DYNAMICS, INC.
d/b/a BDI MARKETING,** an Indiana Corporation,
N.V.E., INC., a New Jersey Corporation, and
HANSEN BEVERAGE COMPANY,
a Delaware Corporation,

Defendants.

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JOINT DISCOVERY PLAN IN ACCORDANCE WITH FED. R. CIV. P. 26(f)

Pursuant to Fed. R. Civ. P. 26(f) and the Court's March 13, 2009 Notice, the parties communicated about a Joint Discovery Plan via e-mail, and then a telephonic conference was held on April 15, 2009. The participants in the conference call were:

Ronald Ohren for Plaintiff AXIS Insurance Company.

Phyllis Golden Morey for Defendant Innovation Ventures, LLC d/b/a Living Essentials.

I. FACTUAL AND LEGAL BACKGROUND

This case arises out of a claim for insurance policy benefits made by Defendant. Plaintiff issued a "media special perils" insurance policy to Defendant.

Defendant is involved in litigation in this District and in the Southern District of California regarding Defendant's 5-Hour Energy® product and related matters.

Plaintiff initiated this action by filing its complaint on December 29, 2008. Defendant filed an Answer and Counterclaim (including a bad faith claim) on February 17, 2009.

II. PROPOSED AMENDMENTS TO PLEADINGS

At this time, neither Plaintiff nor Defendant anticipates amendment of its pleadings.

III. ADMISSIONS OF FACTS AND STIPULATIONS REGARDING DOCUMENTS

The parties have conferred in an effort to determine what admissions of fact and stipulations regarding the authenticity of documents may be presented. The parties agree that the copy of the policy attached as Exhibit "A" to Plaintiff's complaint is authentic. As to other

material facts, the parties have been unable to reach agreement regarding such admissions or stipulations.

IV. DISCOVERY TOPICS

A. Plaintiff

Plaintiff anticipates that discovery will include matters relating to the litigation for which Defendant seeks insurance coverage, as well as matters relating to the underwriting of the insurance policy (including matters relating to other claims or lawsuits that may be relevant to rescission of the policy or other coverage defenses asserted by Plaintiff).

B. Defendant

Defendant anticipates that discovery will include all aspects of Plaintiff's decisions to issue a policy and to rescind coverage to Defendant.

V. DEPOSITIONS

At this time, the parties do not expect to depose more than 5-10 witnesses each. The parties are presently unable to better estimate the number of depositions in light of the fact that even preliminary discovery disclosures have not yet occurred.

Each deposition shall be limited to one day of seven hours, unless extended by agreement of the parties or by order of the Court.

A. Plaintiff

Plaintiff is currently unaware of the identity of all witnesses it may need to depose in this matter, however, Plaintiff intends to take the following depositions, at a minimum:

- Rule 30(b)(6) deposition of Defendant regarding matters relating to Plaintiff's rescission of the policy, as well as Plaintiff's other coverage defenses.
- Deposition of the Broker.

B. Defendant

Defendant is currently unaware of the identity of all witnesses it may need to depose in this matter, however, Defendant intends to take the following depositions, at a minimum:

- Rule 30(b)(6) deposition of Plaintiff on the factual basis for the rescission claim pleaded by Plaintiff.
- Deposition of Scott A. Swift, Assistant Vice President – Claims for Media Professional Insurance, Plaintiff's representative/agent.
- Deposition of the Broker.

VI. INTERROGATORIES

At this time, Plaintiff anticipates seeking leave to serve in excess of twenty-five interrogatories, including sub-parts. At this time, Defendant does not anticipate seeking leave to serve an excess number of interrogatories.

VII. EXPERT TESTIMONY

A. Plaintiff

Plaintiff is not presently able to determine whether expert testimony will be needed to support its claims, positions or defenses or to rebut Defendant's.

B. Defendant

It is Defendant's position that expert testimony may be needed regarding the issue of the reasonableness of Plaintiff's claims handling practice in relation to Defendant's bad faith counterclaim.

VIII. ELECTRONIC DISCOVERY

The parties agree to preserve evidence material to issues likely to be litigated in the above case and which are properly discoverable. This includes both paper and electronically stored information. The parties agree that they will use their best efforts to produce all electronically stored information in both its native format and text-readable Bates-numbered PDF format.

IX. PROTECTION OF ATTORNEY-CLIENT PRIVILEGE

The parties agree that, as to claims of privilege or of protection as trial-preparation material asserted after production, the procedure of Fed. R. Civ. P. 26(b)(5)(B) will apply. The parties may also address such matters through a protective order.

X. DISCOVERY DISPUTES

There are no discovery disputes outstanding at this time. Discovery has only recently commenced, and, therefore, it is difficult to anticipate at this time whether and what type of discovery disputes will arise between the parties.

XI. INITIAL DISCLOSURES

The parties do not object to the initial disclosure requirements of Rule 26(a)(1). The parties agree to exchange initial disclosures via email on or before May 15, 2009.

XII. PROPOSED CASE MANAGEMENT PLAN

Exchange initial disclosures – May 15, 2009 (via email)

Discovery commences – April 16, 2009

Close of fact discovery – October 2, 2009.

Exchange of expert reports (per burden of proof) – November 2, 2009

Exchange of rebuttal expert reports – December 4, 2009

Close of expert discovery – January 15, 2010

Dispositive motions filed by – February 19, 2009

XIII. RESOLUTION

The parties agree that settlement cannot be evaluated at this time as some fact discovery will be necessary before the parties can accurately assess their settlement positions.

Dated: April 16, 2009

/s/ Ronald L. Ohren (with permission)
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on April 16, 2009, I electronically filed the foregoing **JOINT DISCOVERY PLAN IN ACCORDANCE WITH FED. R. CIV. P. 26(f)** with the Clerk of the Court for the Eastern District of Michigan using the ECF System which will send notification to the following registered participants of the ECF System as listed on the Court's Notice of Electronic Filing: Eric R. Little, Mark A. Cantor, Marc Lorelli, Phyllis Golden Morey, Ronald L. Ohren and Morley Witus.

I also certify that I have mailed by United States Postal Service the paper to the following non-participants in the ECF System: None.

BROOKS KUSHMAN P.C.

By: /s/ Phyllis Golden Morey

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